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Nos. 78-1751, 78-1754 and 78-1755

In the Supreme Court of the United States

OCTOBER TERM, 1978

ROBERT F. MCPARTLIN, PETITIONER
v.
UNITED STATES OF AMERICA

EDWIN T. BULL, PETITIONER
v.
UNITED STATES OF AMERICA

VALENTINE JANICKI, PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-77) is reported at 595 F. 2d 1321.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1979. Petitions for rehearing were denied on April 23, 1979 (Pet. App. 78-79). The petitions for a writ of certiorari were filed on May 23, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court abused its discretion by denying petitioners' motions for a severance.

2. Whether disclosure of the pretrial statements of a government witness at the commencement of trial deprived petitioners of a fair trial.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted of violating the Travel Act, 18 U.S.C. 1952, and the Wire, Radio, Television Fraud Act, 18 U.S.C. 1343, and of conspiring to violate those provisions, in violation of 18 U.S.C. 371.[1] Petitioner McPartlin was sentenced to a total of eight years' imprisonment and fines totalling $40,000. Petitioner Bull was sentenced to three years' imprisonment and fines of $20,000. Petitioner Janicki was sentenced to ten years' imprisonment and fines of $80,000.

The evidence presented at trial, which is summarized by the court of appeals (Pet. App. 2-13), showed that co-defendant Frederick B. Ingram, chairman of the board of directors of a corporation based in Louisiana (Ingram Corporation), paid petitioners McPartlin and Janicki and certain other persons more than $900,000 in bribes to obtain a multi-million dollar sludge-hauling contract from the Chicago Metropolitan Sanitary District. Petitioner Janicki was a trustee of the sanitary district. Petitioner McPartlin was an Illinois legislator. Petitioner Bull, president of an Illinois towing company, served as an intermediary through whom some of the illegal payments

[1]Petitioner Janicki was also convicted on two counts of filing false income tax returns, in violation of 26 U.S.C. 7206(1).

were made. William J. Benton, an unindicted co-conspirator, was vice-president of Ingram Corporation. Benton made the illegal payments to the Illinois officials on behalf of Ingram Corporation.

ARGUMENT

1. Petitioners contend that they were deprived of a fair trial because the district court refused to sever their case from that of the Louisiana defendants (Janicki Pet. 17-22; Bull Pet. 6-11; McPartlin Pet. 13-16). They argue that the defense of the Louisiana defendants (that bribery funds were paid to protect Ingram Corporation's business) was inconsistent with their own defense (that no bribes were demanded or received). They further contend that certain evidence was admitted against them that would have been excluded if a severance had been granted.[2]

These claims are without merit. It is well established that the trial court has broad discretion to grant or deny a severance, and its decision will not be reversed unless the court clearly abused that discretion. See, *e.g.*, *Opper* v. *United States*, 348 U.S. 84, 95 (1954); *United States* v. *Tanner*, 471 F. 2d 128, 137 (7th Cir.), cert. denied, 409

[2]Bull (Pet. 8-9) and Janicki (Pet. 6) also argue that their cross-examination of one of the government's witnesses was unduly restricted. But the district court merely gave a general admonition against repetitious cross-examination. Moreover, the witness in question was cross-examined extensively concerning his retention of the bribery funds. Thus, as the court of appeals noted (Pet. App. 17), petitioners have wholly failed to "show any prejudice resulting from the admonition or point to any specific ruling curtailing this cross-examination. It was, moreover, entirely proper for the judge to attempt to forestall repetition." See Fed. R. Evid. 611; *United States* v. *Mandell*, 525 F. 2d 671, 679 (7th Cir. 1975), cert. denied, 423 U.S. 1049 (1976); *United States* v. *Jorgenson*, 451 F. 2d 516, 520 (10th Cir. 1971), cert. denied, 405 U.S. 922 (1972).

U.S. 949 (1972); *United States* v. *Finkelstein*, 526 F. 2d 517, 523 (2d Cir. 1975), cert. denied, 425 U.S. 960 (1976). Moreover, the defendant has the burden of clearly establishing substantial prejudice. See Fed. R. Crim. P. 14; *United States* v. *Di Giovanni*, 544 F. 2d 642, 644 (2d Cir. 1976); *Tillman* v. *United States*, 406 F. 2d 930, 935 (5th Cir.), cert. denied, 395 U.S. 830 (1969).

As the court of appeals noted (Pet. App. 14-16), antagonistic defenses do not necessarily require a severance. The jury may rationally accept one defense and reject the other, depending on the facts in evidence. See, *e.g.*, *United States* v. *Bolden*, 514 F. 2d 1301, 1310 (D.C. Cir. 1975); *United States* v. *Joyce*, 499 F. 2d 9, 21 (7th Cir.), cert. denied, 419 U.S. 1031 (1974); *United States* v. *Hutul*, 416 F. 2d 607, 620-621 (7th Cir. 1969), cert. denied, 396 U.S. 1007 (1970); *Dauer* v. *United States*, 189 F. 2d 343, 344 (10th Cir.), cert. denied, 342 U.S. 898 (1951). To the extent a severance is ever required it should only be when defenses are mutually exclusive to the point that a fair resolution of guilt or innocence is precluded. This may result when one defendant directly incriminates another and there is a substantial danger "that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty." *Rhone* v. *United States*, 365 F. 2d 980, 981 (D.C. Cir. 1966). See also *De Luna* v. *United States*, 308 F. 2d 140 (5th Cir. 1962).

Here, as the court of appeals properly found, petitioners' defenses did not directly attribute guilt to one another. The degree of inconsistency in theories was not such that the jury would infer that all defendants were guilty on that basis alone. And, as pointed out by the court of appeals, the logical basis of the defenses was not necessarily at variance (Pet. App. 14-15):

> The Ingrams contended that the payments were made only because the Sanitary District threatened to take action that would have resulted in financial disaster to Ingram Corporation, and therefore neither of them had the [requisite criminal intent to bribe] * * *. It was not necessary to this defense that [petitioners] were guilty of extortion or received bribes, because it was possible that Benton, through whom the corporation's communications with, and payments to, [petitioners] were carried out, did not pass any of the money on but kept it all himself.[3]

Under these circumstances, and in consideration of the length of these protracted proceedings, the district court was within its discretion in denying a severance. See, *e.g.*, *United States* v. *DiGiovanni*, *supra*, 544 F. 2d at 644-645; *United States* v. *Bolden*, *supra*, 514 F. 2d at 1310; *United States* v. *Kahn*, 381 F. 2d 824, 840-841 (7th Cir.), cert. denied, 389 U.S. 1015 (1967).

Petitioners' related contention that they were prejudiced by evidence that would not have been admissible at a separate trial is also groundless. Ingram's testimony about the payments that he authorized Benton to make to petitioners on behalf of Ingram Corporation clearly would have been admissible at a separate trial . Moreover, the district court carefully instructed the jury that rebuttal evidence showing that Ingram had paid bribes to foreign

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[3]It is also significant that petitioners and the Louisiana defendants shared a common defense of attempting to shift blame to Benton. Since Frederick Ingram did not communicate directly with petitioners concerning the bribes, Ingram's defense of economic extortion was based entirely on what he claimed Benton had told him about the demand for bribes. Petitioners' defense was based largely on the claim that Benton kept the bribe money for himself and never made any payments to them.

officials was to be considered only as to Ingram's state of mind. The court emphasized that "this evidence relates solely to the defendant Frederic B. Ingram and to no other defendant and is to be considered by you only in connection with Mr. Frederic B. Ingram and no other defendants" (Tr. 5637-5640). Since the rebuttal evidence was not confusing and did not in any way implicate petitioners, there was no danger that the jury would be unable to consider the evidence separately or follow the court's limiting instruction (Pet. App. 17). See also *United States* v. *Toliver*, 541 F. 2d 958, 962-963 (2d Cir. 1976).

2. Petitioners further contend (Bull Pet. 11-13; Janicki Pet. 10-17; McPartlin Pet. 4-13) that the government's disclosure at the beginning of trial that William Benton kept $375,000 of the bribe money violated the government's obligation under *Brady* v. *Maryland*, 373 U.S. 83 (1963). This contention is also insubstantial.

The government's delayed disclosure resulted from a reasonable misunderstanding of the scope of the district court's pretrial discovery order. That misunderstanding does not evince a deliberate attempt by the government to gain a tactical advantage.[4]

Moreover, as noted by the court of appeals (Pet. App. 43), full disclosure of Benton's actions was made at the beginning of the trial. This case therefore does not involve a violation of *Brady*, which considered only the question

[4]The prosecutor explained to the district court that since the court had previously denied petitioners' request for pretrial discovery of evidence that " 'Benton improperly took funds and property from Ingram Corporation * * *,' " he did not consider such evidence within the court's general disclosure order (Tr. 221-223). The district court stated that it understood how the misunderstanding arose, adding that it had intended to deny pretrial disclosure only of thefts of "funds unrelated to this case" (Tr. 223-224).

whether suppression of exculpatory material until after trial requires a new trial. *Brady* did not hold that the government must make pretrial disclosure of exculpatory statements, and this Court has subsequently indicated that pretrial disclosure is not constitutionally required. *United States* v. *Agurs*, 427 U.S. 97, 112 n.20 (1976). Moreover, the Jencks Act, 18 U.S.C. 3500, requires disclosure of such statements only after a witness has testified at trial. See, *e.g.*, *United States* v. *Dotson*, 546 F. 2d 1151, 1152-1153 (5th Cir. 1977); *United States* v. *Scott*, 524 F. 2d 465, 467-468 (5th Cir. 1975); *United States* v. *Lomprez*, 472 F. 2d 860, 864 (7th Cir. 1972), cert. denied, 411 U.S. 965 (1973); *United States* v. *Harris*, 409 F. 2d 77, 80-81 (4th Cir.), cert. denied, 396 U.S. 965 (1969); see also *United States* v. *DeLeo*, 422 F. 2d 487, 498-499 (1st Cir.), cert. denied, 397 U.S. 1037 (1970). It is undisputed that the government fully complied with the Jencks Act in this case.

Relying on decisions stating that a new trial may be required when late disclosure of exculpatory evidence prevents the defendant from receiving a fair trial,[5] petitioner Janicki contends that there is a conflict among the circuits concerning the appropriate standard for reviewing cases involving delayed disclosure (Pet. 11-12). However, the Seventh Circuit applied the standard adopted in the cases cited by petitioner Janicki inquiring whether the delay resulted in unfairness (Pet. App. 44-45). Thus, although there may be a difference in the approach of the courts of appeals, that difference could not have affected the result here, since petitioners wholly failed to

[5]See, *e.g.*, *United States* v. *Kaplan*, 554 F. 2d 577, 580 (3d Cir. 1977); *United States* v. *Pollack*, 534 F. 2d 964, 973-974 (D.C. Cir.), cert. denied, 429 U.S. 924 (1976); *United States* v. *Miller*, 529 F. 2d 1125, 1128-1129 (9th Cir.), cert. denied, 426 U.S. 924 (1976).

demonstrate unfairness or prejudice even under the standard most favorable to them (*ibid.*).

The record clearly contradicts petitioners' claim that they were prejudiced because they had inadequate opportunity to investigate the extent of Benton's peculations from the bribery fund. Although the government did not disclose before trial Benton's explicit admission that he had embezzled $375,000, the government previously disclosed Benton's and Ingram Corporation's financial records, from which petitioners could have discerned Benton's misappropriations (Tr. 236-240). The record also shows that seven months prior to trial the defense team was fully aware that Benton stole some of the bribe money. Thus a co-defendant's counsel stated in court (Feb. 2, 1977 Tr. at 19):

> Your Honor, a theory of the defense, for one or more of the defendants, I understand, will be that no money was paid to any official in Chicago.
>
> We want to show that over a period of a number of years, Mr. Benton has developed schemes to steal money from his employer and secrete it overseas.[6]

Under these circumstances, petitioners' claim of surprise and inability to investigate Benton's actions is wholly untenable.

Significantly, the government's disclosure came at the beginning of a nine-week trial. Petitioners therefore had ample opportunity to investigate further Benton's theft

[6]Furthermore, when the government disclosed at trial the specific amount that Benton stole, a co-defendant's counsel stated (Tr. 227): "We suspected it. There is no question about it. That is the reason I am not prepared to stand up here and argue to the Court that I can prove prejudice."

before the trial ended.[7] Nor were the facts surrounding Benton's misappropriations withheld from the jury. The prosecution inquired into Benton's misappropriations (Tr. 1386-1395). Each of the defendants also had the opportunity to examine Benton about the funds that were misappropriated (Tr. 1486-1748). At no time did Benton deny receiving those funds (Tr. 1494-1495). In these circumstances, it is difficult to imagine that pretrial disclosure of the disputed evidence would have added to the effectiveness of the inquiry into Benton's actions.

Finally, we note that the district court denied petitioners' motions for a continuance because it found no prejudice from the delayed disclosure. The court nevertheless stated that it would reconsider such motions if evidence of prejudice was presented (Tr. 248-250). Petitioners did not renew their motions or supplement their presentation. Thus, "the failure of the defendants to pursue adequately any subsequent investigation and their subsequent failure to request additional time for any investigation thoroughly discredits their assertion that they were prejudiced by the timing of the disclosure" (Pet. App. 45). See also *United States* v. *Miller*, 529 F. 2d 1125, 1128-1129 (9th Cir.), cert. denied, 426 U.S. 924 (1976); *United States* v. *Scott*, 524 F. 2d 465, 468 (5th Cir. 1975); *United States* v. *Baxter*, 492 F. 2d 150, 174 (9th Cir. 1973), cert. denied, 416 U.S. 940 (1974).[8]

[7]Petitioners were free, of course, to use investigators for this purpose while their attorneys participated in the trial.

[8]Petitioner McPartlin also argues (Pet. 16-18) that the district court erred in making certain evidentiary rulings. Those claims are sufficiently answered by the opinion of the court of appeals (Pet. App. 45-58), on which we rely.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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